Message

From: Eric Allmon [eallmon@txenvirolaw.com]
Sent: 3/9/2022 11:11:24 PM
To: Ryland, Renea [Ryland.Renea@epa.gov]
CC: Maguire, Charles [maguire.charles@epa.gov]; Richard Lowerre [rl@txenvirolaw.com]
Subject: Update on Port of Corpus Christi and Tier 2 Issues
Attachments: 2022.03.02 ED's Objections to Prefiled Testimony.pdf; 2022.03.09 Prehearing Statement for Kings and Steves.pdf; 2022.01.10 ED Response to 1st RFPs and INTs.pdf; ED Granbury Modeling Work.pdf; EPA non-obj ltr granbury.pdf

Flag: Follow up

Renea,

Apologies for the long e-mail, but there are a few things I wanted to give you an update on, related to the attached documents.

The hearing on the merits in the Port of Corpus Christi matter is set to begin next week. I believe the youtube link for that is

https://www.youtube.com/channel/UCB6Zt8IdtJosOwEXDBE1BpQ.

The Port has recently again said that it will move the discharge point from even where it was proposed earlier in the remand proceeding. That is because affected persons presented modeling that the location proposed at the start of the remand proceeding would have adverse impacts upon wildlife due to salinity impacts. The Port also seems to be implying that it has a lot of freedom to move the discharge point after the permit is issued. Every time the public presents modeling to address the Port's proposed discharge point, the Port has responded by changing the discharge point and saying that the public's modeling is inapplicable to the new point. That is discussed in the attached opening statement that Port Aransas Conservancy has submitted to the ALJs' starting at pdf page 9. Even beyond the problems this raises in the hearing process, this constant shifting of the authorized discharge location is contrary to the requirement that the public be given the opportunity to provide comments on a draft permit. No public notice and comment has been provided with regard to the discharge point that the Port is now proposing, and which the TCEQ would be authorizing if it issued the permit.

Notably, the TCEQ Executive Director in that case is still taking the position that the facility is a "Minor" facility contrary to EPA's position. Importantly, the Executive Director is objecting to the admission of the EPA's December 2021 interim objection letter into the record, reflected on page 2 of the attached ED's Objections. The ED is taking the position that EPA's interim objection letter is irrelevant to the ALJs' consideration of the permit application. In addition to being directly contrary to EPA's request in its interim objection, this also ignores the fact that the Tier 2 review, CORMIX modeling, and WET testing issues addressed in EPA's interim objection are matters directly bearing upon the issues under consideration at this point in the hearing. I will note that under Texas law, the Commissioners may only revise an ALJ's recommendation based upon the record made before the ALJs. (Tex. Gov't Code Section 2003.047(m)). So, in essence, if the ALJs were to sustain the ED's objection, then I expect the TCEQ would take the position that the the Commission is prohibited from considering EPA's letter when finally considering the permit application. You will recall in the Oak Grove Steam Electric Station matter the TCEQ took the position that it could not consider comments from the EPA made after the close of the hearing because they were not in the SOAH record and EPA is not a party authorized by the TCEQ rules to file an exception to a proposal for decision. I fully expect that the ALJs' will overrule the ED's objection, but the fact that the ED would object to admission of the interim objection into the record is something that I wanted to ensure EPA was aware of.

I'll note that those objections also take the position that the Commission cannot consider toxicity information from the public unless the toxicity testing was performed at a particularly accredited lab. Since most academic

labs lack such accreditation, the ED is saying that even peer-reviewed studies submitted by the public cannot be even considered by the TCEQ when deciding whether to issue a permit. This trend of setting high bars for the type of information that TCEQ will even consider from the public continues to undermine public participation in the permitting process generally - including the comment period.

With regard to the Tier 2 issue, I wanted to let EPA know of yet another creative approach that the TCEQ Executive Director is adopting to avoid implementation of the Tier 2 review requirements. On pages 2 - 3 of the attached ED's response to discovery, the Executive Director explains that it presumes that the baseline water quality in the receiving waters is the same as the minimum standard for attainment of the applicable uses. (This means that in considering dissolved oxygen, for example, TCEQ will assume a baseline water quality for a receiving water of 5.0 mg/L even if water quality sampling for the past 40+ years showed that DO levels were a healthy 6.0 or above.). This is in the context of an application by the City of Granbury for a new domestic wastewater discharge permit. In deposition, the TCEQ staff person who performed the anti-degradation review was unfamiliar with the logic set forth in this response.

The Granbury matter is also a case where the ED modeled dissolved oxygen of 4.81 mg/L and found that such a result demonstrated compliance with the water quality standard of 5.0 mg/L. This issue of the TCEQ essentially altering the water quality standard through this general practice of a 0.2 allowed deviation from the water quality standard is an issue raised in the pending de-delegation petition, and this is a concrete example of that. Of course, the Executive Director is portraying EPA's non-objection letter regarding this permit (Also attached) as approval of this approach. We would ask that in EPA's oversight of these permitting decisions that EPA evaluate whether the modeling performed by the TCEQ produces a number that complies with the actual standard. In a certain sense, checking that the numbers match would be something fairly simple for EPA to do.

I'll note that in hearing the City of Granbury realized that it would be hard to argue that 4.81 is higher than 5.0. So, after the deadline for Protestants' evidence, the City performed and presented new modeling that produced better numbers for the City (though, often still less than 5.0). That modeling was premised on some fundamentally flawed assumptions, but due to the order of presentation created by the prima facie presumption established by SB 709, the Protestants were prohibited from presenting our critiques of Granbury's new modeling into the record. We made an offer of proof, and will likely sue TCEQ for denial of due process if the permit is granted, but it shouldn't be so hard for the public to find out what TCEQ's basis for its decision will be, and the public should not be prohibited from presenting critiques of that basis. Under the 709 process, applicants are repeatedly waiting to see what protestants file as evidence, then bringing forth an entirely new logic for issuance of the permit that the public has never seen before at a stage where SOAH is taking the position that the public is no longer allowed to offer anything new. Both the Port of Corpus Christi and the City of Granbury matters are examples of this dynamic which is playing out in many cases.

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